No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

—v.—

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
AND
BRIEF AMICUS CURIAE OF ARMCO, BETHLEHEM STEEL CORPORATION, INLAND STEEL INDUSTRIES, INC., NATIONAL STEEL CORPORATION, AND USX CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation hereby move this Court for leave to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari of the Pension Benefit Guaranty Corporation in the captioned case, pursuant to Rule 36.1 of the Supreme Court Rules.

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectively the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp."). The Steel Companies produce 47 percent of the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301, *et seq.* Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of this Petition for Writ of Certiorari for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC Insurance Program. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including the Steel Companies, by jeopardizing the financial health of the insur-

ance program, and by in all likelihood forcing yet another increase in PBGC insurance premiums.

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted by LTV Corp.'s transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet or exceed ERISA's minimum funding standards. By comparison, LTV Steel has diverted resources that would otherwise have gone to meet its pension funding obligations to modernize its facilities, reduce its production costs and to otherwise dramatically improve its competitive position, all while continuing to provide its workers with essentially the level of pension benefits that existed prior to LTV Corp.'s bankruptcy. This artificial competitive advantage gained by LTV Steel through abuse of the federal pension insurance program subverts the declared national policy in favor of fostering and maintaining a strong domestic steel industry without a federal bailout.

The PBGC's Petition for Writ of Certiorari presents important questions regarding the integrity of the national pension insurance fund managed by the PBGC and the continued protection of its participants and beneficiaries. These issues are of great significance to the Steel Companies because if the decision of the Second Circuit is allowed to stand, LTV Steel will have received, in effect, a bailout loan from the federal government, one which grants a decisive competitive advantage to LTV Steel and distorts competition within the steel industry, and one which seriously weakens the financial integrity of the federal pension insurance program. Such a result, if allowed to stand, subverts the national policy in favor of a strong domestic steel industry and undermines the purpose of Title IV of ERISA.

For the foregoing reasons, the Steel Companies seek leave of this Court to file the following brief *amicus curiae* in support of the PBGC's Petition for Writ of Certiorari.

Respectfully submitted,

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*Counsel for the Steel Companies requested and received consent of the PBGC to file the accompanying Brief Amicus Curiae. Counsel for the PBGC contacted counsel for Respondents, LTV Corp. and LTV Steel, on behalf of the Steel Companies, but Respondents declined to give their consent.

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INTEREST OF AMICI

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectively the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp.").[1] The Steel Companies produce 47 percent of the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301, *et seq.* Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of the PBGC's Petition for Writ of Certiorari for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC fund. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including the Steel Companies, by jeopardizing the financial health of the insurance program, and by, in all likelihood, forcing yet another increase in PBGC insurance premiums. *See* Petition of PBGC for Writ of Certiorari at 4 n.4 (hereafter "Petition").

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted

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[1]LTV Corp. and its subsidiary, LTV Steel, will be referred to collectively as "LTV."

by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet ERISA's minimum funding standards. The decision below, allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer runs contrary to the national policy, articulated by both Congress and the Executive Branch, of fostering and maintaining a strong domestic steel industry.

ARGUMENT IN SUPPORT OF PBGC'S PETITION FOR WRIT OF CERTIORARI

The PBGC's Petition for Writ of Certiorari should be granted because the Petition presents issues of grave national importance to the steel industry and to all participants and beneficiaries of the Pension Benefits Guaranty Corporation's pension insurance fund. LTV skillfully placed itself in a position that caused the PBGC to terminate certain of its pension plans and then objected to responsible efforts on the part of the PBGC to restore those plans when LTV subsequently demonstrated its willingness and ability to fund the pension plans. LTV, in its post-bankruptcy dealings with the PBGC and its own labor unions, sought to achieve the twin goals of shedding the cost of its pension plans while maintaining the high level of pension benefits for its workers in order to buy labor peace, and obtain unfair economic advantages over its competitors within the domestic steel industry.

Ultimately, the PBGC's Restoration Notice should be enforced because restoration furthers the purpose of Title IV of ERISA as well as the national policy of supporting the domestic steel industry. The Second Circuit erred by failing to recognize these policies and by misconstruing the "arbitrary and capricious" standard of judicial review of an administrative determination. Indeed, the PBGC's determination that LTV's follow-on plans are an abuse of the pension system and that LTV is and has been capable of meeting its pension obligations is fully supported by the Administrative Record as well as other post-termination public financial information made available by LTV.

I. The Failure of the Second Circuit to Enforce the PBGC's Restoration Order Subverts the Express Congressional Intent to Create the PBGC as a Pension Insurance Fund of Last Resort and to Maintain a Strong and Competitive Domestic Steel Industry.

As a program of last resort, the Title IV Insurance Program is designed to protect the pension expectations of American workers, not to bail out a financially troubled company. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980). The Second Circuit's decision makes the PBGC in effect an investor in LTV Steel rather than a guarantor of pension benefits, and the decision threatens the financial integrity of the termination insurance program. In addition, the decision frustrates the national policy expressed by Congress of fostering a strong and modernized domestic steel industry.

A. The PBGC's Restoration Notice Fully Accords with the Goals and Policies of ERISA.

Title IV of ERISA was enacted to provide an insurance fund of last resort. It reflects, and was intended to set at

rest, the congressional concern for catastrophies faced by employees who lose vested benefits if a business or pension plan fails. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. at 13, *reprinted in* Legislative History of the Employment Retirement Income Security Act of 1974, Volume III, p. 4962 ("ERISA LEG. HIST."). Prior to the enactment of ERISA, Congress recognized that employees might well "receive nothing or less than they had expected" because employers were not required to insure their pension liabilities. *Id.* This problem was dramatized in the Senate Report accompanying ERISA, which referred to the Studebaker plant closing at South Bend, Indiana. Some 4,000 employees between the ages of 40 and 60 received only approximately 15 percent of their vested benefits, despite the fact that the Studebaker plan's vesting was fairly generous and the plan funding would have been adequate had the plant remained open. *Id.* In response to this "great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated," Congress established a pension insurance program under Title IV of ERISA. *Id.* at 4973. The congressional purpose was to insure certain classes of pension benefits of American workers when the employer was incapable of funding its pension liabilities.

Congressional statements at the time of passage of ERISA confirm that Congress intended Title IV funds to be used only *in extremis*, to protect the beneficiaries of covered pension plans from "a loss of benefits as a result of inadequate assets to meet the vested liabilities of the plan." 120 Cong. Rec. H4283 (1974), *reprinted in* II ERISA LEG. HIST. at 3382. The insurance was to come into play only if the sponsoring company was entirely unable to fund its pension liabilities as a result of the termination of the business. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. 87, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4971, and I ERISA LEG. HIST. at 1155; *see also Nachman Corp. v. PBGC, supra*, 446 U.S. at 375 (Congress intended to insure that a worker actually receives the benefit that has been promised upon retirement if he has fulfilled the conditions required to obtain that benefit).

Further, the 1986 amendment of ERISA, the Single-Employer Pension Plan Amendment Act ("SEPPAA"), 29 U.S.C. §1001 *et seq.*, underscores congressional concern about a potential abuse of the termination insurance program. In enacting SEPPAA, Congress recognized that "the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and other premium-payers." 29 U.S.C. §1001b(a)(4). Accordingly, in 1986, before the termination of LTV's plans, Congress modified Title IV for the additional purposes of "increase[ing] the likelihood that participants and beneficiaries under single employer defined benefit pension plans will receive their full benefits," and "provid[ing] for the transfer of unfunded pension liabilities onto the single-employer pension plan termination system only *in cases of severe hardship.*" 29 U.S.C. §1001b(c)(3) and 1001b(b)(2) (emphasis added).[2]

The Second Circuit concluded that the PBGC did not have authority to restore a pension plan to an employer upon the determination that the employer's follow-on plans constituted an abuse of the pension insurance fund, on the grounds that Congress did not specifically enumerate establishment of abusive follow-on plans subsequent to an involuntary termination as a ground for restoration. *PBGC v. LTV Corp.*, 875 F.2d 1008, 1017 (2d Cir. 1989) (PGBC App. 17a). Although Congress may not have enumerated follow-on plans as a specific ground for restoration, Congress has expressly given the PBGC the authority and discretion to restore terminated plans, and described the goals and responsibilities of the PBGC in ERISA's statement of purpose in the broad-

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[2]Although the Pension Protection Act in 1987 gave the PBGC the right to recover from the employer 100 percent of benefits paid out under a terminated program, the PBGC's restoration authority still remains of paramount importance in avoiding abuse of the pension insurance program. As the PBGC explains in its Petition, the PBGC has historically recovered only a few cents on the dollar in a recovery action. *See* Petition at 15 n.14.

est terms. *See SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (independent agency is not limited to exercising powers that are specifically enumerated, but is empowered to act to carry out the intent of Congress in adopting the underlying statute).

The statutory provision empowering the PBGC to restore pension plans to employers contains a broad grant of discretion to the PBGC for determining administratively the circumstances under which restoration is necessary and appropriate. Section 4047 of ERISA, 29 U.S.C. §1347 reads:

> In the case of a plan which has been terminated under Section 1341 or 1342 of this title, the [PBGC] is authorized in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status . . . .

The Second Circuit's conclusion that the PBGC cannot restore LTV's pension plans without a direct and specific authorization from Congress is incorrect, as the PBGC's restoration notice in this instance is clearly within the broad grant of discretion allowed by Congress under ERISA and SEPPAA. The PBGC's decision to restore the LTV plans is fully in accord with the goals of preserving the long term strength of the PBGC pension insurance program, and having the PBGC assume responsibility for a pension plan only in the last resort when an employer is unable to meet its pension obligations. The mere fact that Congress has not enumerated a power does not deny a federal agency that power, as long as it falls within the discretion allowed the agency and is consistent with the goals and policies of the

underlying authorizing statute. *Chenery, supra*, 332 U.S. at 208–09.[3]

The PBGC's conclusion that LTV's financial condition had substantially improved since its plans were terminated, provides ample additional, independent justification for the PBGC's Restoration Notice.[4] This conclusion underscores the fact that LTV was not so much unable as *unwilling* to fund its pension liabilities. To allow LTV Steel to avoid its pension obligations is to ratify the pernicious idea that a troubled company can transfer its pension liabilities to the PBGC's insurance program and use the savings derived therefrom to recapitalize, modernize and revitalize the company as a going concern. Such a result is not the purpose for which ERISA was enacted, nor for which the PBGC and the pension insurance program were created. The decision below conflicts with congressional intent with regard to ERISA and turns the PBGC into a federal bailout program for trou-

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[3]The Second Circuit also based its conclusion on an analysis of post-termination and restoration legislative history, involving consideration by Congress of additional amendments to ERISA in 1987. The Second Circuit found persuasive the fact that Congress "considered and rejected the idea of prohibiting the establishment of follow-on plans and making the establishment of such plans a basis for a restoration decision." *PBGC v. LTV*, 875 F.2d at 1017 (PBGC App. 18a.) As a matter of statutory interpretation, no conclusion can be derived from Congressional action or inaction in 1987, absent a specific statement on the part of Congress that a given amendment was rejected because Congress believed that the PBGC should not have such power. In fact, the decision of Congress not to enact specific amendments prohibiting follow-on plans and making the establishment of such plans a basis for restoration is equally consistent with the conclusion that Congress believed that the PBGC *already had the power to restore pension plans to an employer in the face of an abusive follow-on plan*. Congress may not have wanted to *limit* the PBGC's discretion in determining under what circumstances a follow-on plan fell into the category of abusive. Thus the general rule of statutory interpretation that no inference may be drawn from legislative action or inaction after the enactment of the original statute should be applied in the instant case and the ERISA and SEPPAA provisions applied as they stood at the time the PBGC restored the plans. *See, e.g., Waterman Steamship Corp. v. United States*, 381 U.S. 252, 268–69 (1965) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *United States v. Price*, 361 U.S. 304, 313 (1960); *Fogarty v. United States*, 340 U.S. 8, 14 (1950) (abortive action of subsequent Congress cannot supplant the contemporaneous intent of the Congress which enacted the original act).

[4]*See infra*, Section II at 15.

bled companies, a result which, in practice, could bankrupt the federal pension insurance program altogether.[5]

The PBGC's original decision to terminate LTV's pension plans was justified in late 1986 and early 1987, given the state of the steel market and prospects for the domestic steel industry as a whole. Yet, the bleak outlook predicted in late 1986 failed to materialize, and the steel industry, including LTV Steel, has experienced a strong resurgence. LTV was in fact wholly able to meet its pension obligations by mid-1987, and its successful fight against restoration has resulted in what is, in effect, a federal bailout of LTV Steel. Allowing this subsidy to continue subverts the policy of ERISA as well as the strength of the pension insurance program, and places the burden of that subsidy on LTV's competitors and other plan sponsors through increased premiums.[6]

B. The Decision of the Second Circuit Frustrates the National Goal of Fostering a Strong and Competitive Steel Industry without Federal Funds.

Special concern has been expressed by members of Congress about the health and survival of the domestic steel industry because of its importance to both the national economy and national security. The PBGC's Restoration Notice to LTV accords with this congressional concern by maintaining the delicate competitive balance among the steel producers that is so vital to fostering and nurturing a strong domestic steel industry. Conversely, the decision of the Second Circuit to vacate the Restoration Notice has granted LTV significant unfair competitive advantages over other steel producers who are competing in the steel market while continuing to fund their pension plans. The Second Circuit's decision distorts and weakens the competitive environment in the domestic steel industry.

[5] *See* Petition at 4 ("Despite . . . repeated increases [in annual premiums] the PBGC currently has liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of more than $1.5 billion, *exclusive of the liabilities at issue in this case.*") (emphasis added).

[6] Based on historical precedent, a rise in premium costs is a very real and immediate concern. *See* Petition at 4 n.4.

In 1988, Congress considered the Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988, 15 U.S.C. §§ 5101–5110. Speaking in support of the bill, Congressman Walgren of Pennsylvania stated that modernization of the steel industry is critical because:

> continuous and adequate supply of steel is the foundation of our economy and our national security. Many industries, like automobiles, depend on steel; many communities have steel at there core. The National Academy of Science has observed that there are four times as many indirect jobs in industries depending upon steel for business per year as there are direct jobs in the steel industry.

Representative Walgren also emphasized that production of military hardware depends on steel and that the United States must maintain a strong steel industry capable of providing for national defense needs. 134 Cong. Rec. H10019 (Oct. 12, 1988).

Congressional support for a strong steel industry was also expressed in the Findings and Purposes of the Steel Imports Stabilization Act, introduced in 1984. Section 802(c) of the Act stated the finding that implementation of a "national [program] for the steel industry will substantially improve the economy and employment in both the steel and iron ore-producing sectors." Pub. L. 98-573, Title VIII, Sections 801–808 (Oct. 30, 1984) (now codified as an amendment to 19 U.S.C. § 2253; *see* Notes to 19 U.S.C. §2253, 1989 Supp.).

Members of Congress and the Executive Branch have expressed with equal clarity a preference that the steel industry modernize and reorganize without significant federal intervention in the form of financial support. For instance, Congressman Ernest Konnyu of California, speaking in support of the Steel and Aluminum Energy Conservation and Technology

Competitiveness Act of 1988, stated that it is the private sector's investments, rather than those of the federal government, that are necessary to maintain a viable domestic steel industry. 134 Cong. Rec. H10020 (Oct. 12, 1988). President Reagan issued a Steel Decision in 1984, in which he rejected government intervention in the form of protectionist legislation, choosing to rely instead on fair trade and market forces to maximize opportunity for the domestic steel industry to recover and modernize. 49 Fed. Reg. No. 184, 36813 (Sept. 20, 1984). The House of Representatives recently voted to extend the Steel Stabilization Act, 19 U.S.C. § 2253 *et seq.*, which allows the President to extend the Voluntary Restraint Agreements negotiated with steel exporting nations. Speaking in support of the extension, Representative Gaydos repeated Congressional concern for the health of the steel industry: "[T]he steel industry is basic to the economic health of this country . . . [and] a strong steel industry is vital if the United States is to remain competitive in the world market." 135 Cong. Rec. H6418 (Oct. 2, 1989).

By vacating the PBGC's Restoration Notice, the Second Circuit has directly undercut the goal of fostering a strong national steel industry. As a practical matter, the Second Circuit's decision will necessarily give LTV an unfair advantage over other major steel producers in efforts to reinvest and modernize to become more competitive. Although the financial condition of LTV has now improved sufficiently to enable it to meet its funding obligations for the three terminated plans, *see infra* Section II at 16–19, LTV, unlike the other steel producers, has been freed from those obligations by the Second Circuit's decision. As a consequence, LTV has gained approximately $200 million each year for use to modernize its industrial base in the course of reorganization. By comparison, the Steel Companies have met or exceeded the minimum funding requirements of ERISA for their pension plans, and continue to do so, all the while struggling to allocate sufficient resources for capital improvements in order to remain competitive in the market.

C. Failure to Enforce the Restoration Notice Provides LTV Steel With Unfair Competitive Advantages.

Failure to restore the pension plans is projected by the Steel Companies to provide LTV with a cost advantage of about $20 per ton,[7] which in turn will favorably affect LTV's profit margins. Such a cost advantage will also result in access by LTV to capital at more satisfactory terms, making LTV more attractive to lenders, shareholders and other investors. Moreover, it gives LTV additional flexibility to maintain and even increase its market share. While the immediate competitive impact of this bailout has been cushioned somewhat by stronger steel industry results, the transfer of LTV's unfunded pension liabilities to the PBGC is likely to become more significant if the demand for steel products moderates.

During the current period of Chapter 11 protection, LTV has greatly improved its competitive position by making substantial capital expenditures which were enabled in large part by using the funds resulting from termination of its pension plans. LTV's record of capital spending since its Chapter 11 filing has been carried out on an impressive scale. For example, following the bankruptcy filing, LTV made significant capital expenditures at its Indiana Harbor Works and at its Cleveland plants, including a number of "enhancements" at these facilities.[8] Actual and projected capital enhancements for the Indiana Harbor Works and the Cleveland facility together total in excess of one billion dollars.

[7]PBGC projects that restoration of the LTV plans would result in an incremental annual pension cost to LTV of about $200 million. If the LTV plans are not restored, the incremental pension cost not incurred by LTV represents a "cost advantage" to LTV Steel that would be equivalent to about $20 per ton based on the current level of shipments.

[8]As used herein, the term "enhancements" refers to expenditures in excess of base spending required to maintain facilities at current operating capacity and efficiency.

These capital expenditures will reduce LTV's costs and improve the efficiency of its operations, thereby providing it with a substantial future cost advantage over other steel companies. This cost advantage will also enable LTV to continue to make more extensive capital expenditures than it otherwise would have made had it continued to pay its pension obligations.

The cost advantage gained by LTV if its pension plans are not restored also provides it with the flexibility to pursue alternate strategies designed to further enhance its competitive position in the steel market. Based on LTV's average realized price in 1987 of $495 per ton of steel (1987 LTV Annual Report, p. 10), a $20 per ton cost advantage would increase its net income by an amount equivalent to about 4% of sales. This is a particularly significant increase in a mature industry that had an average net *loss* equivalent to 2.6% of net sales for the period 1979 to 1987 and for which the *highest* average annual steel related net income for American Iron and Steel Institute ("AISI") companies as a group was 3.8%. (1987 Annual AISI-Statistical Report).

From 1987 through the present, demand for steel has been relatively high. In such an environment, LTV has had no real need to use its cost advantage to maintain or increase its market share. However, in the event of a decrease in domestic demand or an increase in steel imports, such a cost advantage would give LTV considerable pricing flexibility to reduce prices and maintain its market share to the detriment of other steel companies which have continued to meet their pension obligations. This is particularly unfair and unwarranted when the ability of LTV to afford the restored plan has been demonstrated by the PBGC.

Notwithstanding the improved recent performance by the steel industry, steel producers continue to face problems regarding needed modernization and restructuring programs. In the mid-1980's, stock prices and stockholder's

equity in steel companies declined in the face of the strong dollar, increased foreign competition, and the adverse competitive impact of outmoded domestic production facilities. Major restructuring costs associated with plant shutdowns had an adverse effect upon the credit position of the steel industry. As a result, the major steel producers suffered reductions in credit ratings, limiting their ability to attract capital for restructuring and modernization needs. By comparison, despite LTV's bankruptcy, LTV's attractiveness to investors and lenders is now greatly enhanced by the PBGC's assumption of LTV pension liabilities of about two billion dollars. LTV can be expected to emerge from bankruptcy to operate into the foreseeable future in a significantly stronger financial position than before its plans were terminated.

D. The Second Circuit's Decision May Invite Other Employers to Shed Pension Liabilities onto the PBGC, thus Further Burdening the Fund and its Participants.

The liabilities transferred to the PBGC by LTV will place an unfair higher premium burden on other steel producers and other employers whose premiums fund the Title IV insurance fund. Speaking about the plight of the PBGC under the burden of LTV's plan terminations, Senator John Heinz of Pennsylvania noted that allowing the company to "dump" its retirement obligations on the federal government essentially transfers the company's liabilities to its competitors through higher insurance premiums and a greatly underfunded pension benefit guaranty fund. 133 Cong. Rec. S11387 (Aug. 6, 1987). Representative William Clay of Missouri, speaking in opposition to a proposal to increase PBGC premiums substantially, stated that "LTV Corporation is the most prominent example of management that has chosen to put its money elsewhere [rather than contributing to its pension plans] and now expects to have others pay for the pension benefits it promised." 133 Cong. Rec. H11971 (Dec.

21, 1987). Indeed, permitting one major actor in the steel market to gain additional funding for investment by abusing the Title IV pension insurance program weakens the domestic steel industry and leaves the enormous deficit thereby created to be made up through increased premium payments from other steel companies and other employers.

The District Court in this case recognized the logic of the PBGC's concern that, without restoration, the path of LTV Steel may become "irresistible" to other steel companies. *In re Chateaugay Corporation*, 9 E.B.C. 2236, 2249 (S.D.N.Y. 1988) (PBGC App. 110). Indeed, other steel companies might conclude that they have no other choice. The resulting financial disruption could hurt the steel industry and cripple the PBGC at the same time. The danger of this unfortunate prospect was recognized in the Senate by Senator David Durenburger of Minnesota, speaking in support of the Steel Retirement Benefits Funding Act (S.1811):

> [W]hen the LTV Corp. filed a Chapter 11 bankruptcy petition last year, it sent a clear signal to its domestic competitors. The message from LTV was simply that the easiest way for a steel company to cut cost was to declare bankruptcy and unload the company's pension liabilities onto the Pension Benefit Guaranty Corporation. . . . Moreover, it is no secret that other steel companies have considered following LTV's path in an effort to resolve their pension liability responsibility.

133 Cong. Rec. S14901 (Oct. 22, 1987). Thus, the decision of the Second Circuit could have a corrosive effect on the will of the domestic steel industry to continue to meet pension obligations, and runs directly counter to the policy of fostering and maintaining a strong domestic steel industry without federal funds.

The twin goals of preserving the termination insurance program under Title IV of ERISA to protect the pensions of

American workers when a true disaster occurs, while at the same time fostering a strong and more competitive domestic steel industry, are clearly enhanced by enforcement of the Restoration Notice issued by the PBGC. The Second Circuit's decision significantly undermines these goals. Review by this Court is necessary to preserve the integrity of the insurance program and to restore the competitive forces required for a strong domestic steel industry.

II. The PBGC Correctly Found that LTV is Able to Meet its Minimum Funding Obligations to the Terminated Plans.

The financial condition of LTV has improved significantly since the termination of its plans in January, 1987. This improvement reflects the favorable economic change which affected all domestic steel companies, beginning in 1987 and continuing to the present. LTV, like other companies in the steel industry, benefited from a reduction in imports, increased domestic demand, and improvement in productivity and prices. LTV's improved financial condition cannot, therefore, be wholly attributed to the Chapter 11 reorganization process. One significant advantage which LTV Steel derived from the Chapter 11 proceedings, however, was the ability to reject unfavorable supply contracts—a benefit that should continue after reorganization and should be unaffected by the restoration of the LTV pension plans.

LTV's improvement was readily apparent at the time of the PBGC's Restoration Notice. Moreover, LTV has continued to show increasing financial strength. The PBGC correctly recognized LTV's improved financial condition when it ordered restoration. Further analysis of LTV based upon public documents also demonstrates that LTV is fully able to meet its pension obligations under the terminated plans. These factors alone are sufficient to support the PBGC's decision to order restoration.

A. Analysis of Results in 1987 and 1988 and Comparison with the Performance of Similarly Situated Major Competitors of LTV Steel Further Demonstrates that LTV Steel is Able to Meet its Pension Fund Obligations.

An analysis of LTV's public disclosure of financial information shows that LTV is and has been capable of meeting its pension obligations under the terminated plans. LTV Corp. and LTV Steel cannot dispute that their overall financial picture improved substantially in 1987.[9] In 1987, LTV Corp.'s liquidity improved by more than $480 million over 1986 (1987 LTV Corp. Annual Report, p. 2), and LTV experienced a net cash flow from operations of $761 million.[10] This positive result was achieved after capital expenditures of $344 million and repayment of bank debt and principal repayments on long-term debt of $450 million.

LTV Steel accounted for a significant portion ($370 million) of LTV Corp.'s overall 1987 cash flow from operations. During 1987, LTV Steel also invested $286 million in capital expenditures to modernize facilities which will further enhance its future competitive position. In addition, LTV Finance paid $300 million and LTV Steel paid $137 million of debt outstanding under bank credit facilities. (1987 LTV

[9]The PBGC's administrative decision was predicated on LTV's improved financial condition as shown by the first two quarters of 1987. We have set forth additional data confirming PBGC's determination that LTV's positive results would continue for the full 1987 year in an Appendix to this Brief. *See* App. at A-1.

[10]The cash flow data referred to in this section of the brief is set out in the Appendix hereto. Cash flow data is used because measurement and consideration of net cash flow, stated in terms of available cash and marketable securities, is more relevant to the question of an employer's ability to fund its pension obligations than "net income."

Steel Form 10-Q, p. 35).[11] At the same time, the improved profitability of LTV Steel permitted LTV Corp. to maintain a balance of cash and marketable securities in the amount of $585 million at the end of 1987.[12]

LTV Corp.'s financial condition continued to improve substantially in 1988. For calendar year 1988, LTV Corp.'s net cash flow was $423 million after $413 million in capital expenditures. *See* App. A-1. Thus, a total cash balance of $1.009 billion was achieved by year end 1988. Although LTV Steel had zero net cash flow for 1988, it produced that figure by making capital expenditures of $351 million as part of an aggressive modernization program, and by transferring $372 million in cash to LTV Corp. Without these expenditures and contributions, LTV Steel would have accounted for a significant portion of LTV Corp.'s 1988 net cash flow. *See* App. A-2. Moreover, because of bank credit facilities in the form of $479 million in revolving credit availability and $136 million in letters of credit availability (1988 LTV Corp. Annual Report, p. 17), LTV Corp. achieved an even better liquidity position, in excess of $1.6 billion at the end of 1988.

[11]Subsequent to its Chapter 11 filing and through the first six months of 1988, LTV Steel transferred all available cash to LTV Corp., including $175 million in the first six months of 1988 thereby increasing its cash advance to LTV Corp. to $433 million at June 30, 1988. (LTV Corp. June 30, 1988 Form 10-Q, pp. 17-18).

[12]These overall 1987 results stemmed in large part from the elimination of LTV Steel's unfunded pension liabilities, even though Chapter 11 related factors also contributed to the outcome. (1987 LTV Corp. Annual Report, p. 2).

Summarized, the liquidity of LTV Corp. at year-end 1988 was as follows:

LTV CORPORATION
($ Millions)

Cash Balance on 12/31/88	$1,009
Revolver Facilities	479
Letter of Credit Facility	136
Total Liquidity 12/31/88	$1,624

Accordingly, LTV has had considerable financial flexibility to make a substantial cash settlement with creditors under a reorganization plan, and will be better able to absorb any cyclical downturn which may occur in the steel industry. Thus, the 1988 results further confirm the PBGC's determination that LTV can afford the terminated pension plans on a continuing basis without jeopardizing the reorganization process.

LTV's ability to fund its plans is further illustrated by the actual experience of its competitors in meeting their pension funding obligations. For example, Bethlehem Steel Corporation ("Bethlehem"), has business and pension plan characteristics substantially similar to LTV Steel and it also experienced improved financial results in 1987 and 1988. The different manner in which LTV Steel and Bethlehem have addressed their pension commitments underscores the competitive implications and inequities that result from failure to restore the LTV plans.

Public records show that, as of January 1, 1986, the beginning of the plan year immediately prior to the termination

of the plans at issue in this case, the Bethlehem pension plan and the LTV pension plans were underfunded by roughly the same amount—about $1.7 to $2.0 billion. The minimum ERISA required pension contributions (exclusive of waived and unpaid amounts)[13] for the 1986 plan year (payable by September 15, 1987) for both LTV and Bethlehem would have been about $150 to $200 million. Of course, even though its cash flow was sufficient to fund the terminated plans, LTV's pension contribution in 1987 was zero because of the plan terminations. By comparison, Bethlehem did not terminate its pension plan in 1987, and made contributions totaling $289 million for the 1987 plan year and still experienced an increase in its cash liquidity of $89 million from the end of 1986. (1987 Bethlehem Steel Corp. Annual Report; 1988 Bethlehem Steel Corp. Third Quarter Report.) Furthermore, while the minimum ERISA funding requirements for the Bethlehem pension plan for the 1987 and 1988 plan years (payable by September 15 of the following year) were $174 million and $34 million, respectively, Bethlehem actually contributed $289 million to its pension plan for the 1987 plan year and $691 for the 1988 plan year. Other Steel Companies have also fulfilled their pension obligations despite pressure to divert cash into modernization of facilities and other projects to improve their competitive positions.

In summary, analysis of LTV's financial situation and the actions of other major steel producers with unfunded liabilities similar to LTV's demonstrates that LTV can fund its obligations under the terminated plans while continuing to reorganize and modernize its facilities.

[13]Contributions to the LTV plans for 1984, totalling $175 million, were waived by the IRS in 1985. Waiver requests for $215 million in the 1985 plan year contributions were denied. LTV Steel made some contributions in 1986 to amortize the 1984 waivers, but no contributions were made for the 1985 plan year.

CONCLUSION

For the foregoing reasons, the Steel Companies respectfully support the Petition of the Pension Benefit Guaranty Corporation for a Writ of Certiorari and respectfully urge this Court to grant the Writ.

Respectfully submitted,

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APPENDIX

CASH FLOW EXPERIENCE
($ Millions)

LTV Corporation

	1987	1988
Net Income	$ 503	$(3,154)
Depreciation Expense	250	
Working Capital Changes	128	67
Other	(120)	3,592
Net Cash From Operations Excl. Interest & Past Service	761	747
Investing Activities		
Capital Expenditures	(344)	(413)
Proceeds From Sale of Property	11	93
Other	(4)	28
Financing Activities		
Principal Pmts-Bank & L-T Debt	(450)	(31)
Principal Pmts-Pension & L-T Debt	—	—
Net Increase/(Decrease) in Cash	(26)	423
Cash balance (end of year)	$ 585	$ 1,009

CASH FLOW EXPERIENCE
($ Millions)

LTV Steel Co.

	1987	1988
Net Income	$ 323	$(2,502)
Depreciation Expense	214	200
Working Capital Changes	175	48
(Increase)/Decrease in A/R from Affiliates	(300)	40
Other	(42)	2,888
Net Cash From Operations	370	672
Investing Activities		
Capital Expenditures	(286)	(351)
Transfer (To)/From LTV Corp.	50	(372)
Proceeds From Sale of Property	9	53
Advances to Raw Material Affil.	(6)	0
Financing Activities		
Principal Pmts-Bank & L-T Debt	(137)	(2)
Principal Pmts-Pension & L-T Debt	—	—
Net Increase/(Decrease) in Cash	0	0
Cash balance (end of year)	$ 0	$ 0